

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant sustained personal injury by accident on the date alleged;
- (2) The nature and extent of claimant's injury and disability;
- (3) The amount of compensation due, if any; and
- (4) The liability, if any, of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a foreman for the respondent in their hot asphalt roofing business, noted a sudden onset of pain on October 17, 1990 in his wrist and elbow when he was carrying a bucket of hot asphalt down a ladder. The claimant lost his grip, dropped the bucket and fell off of the ladder, sustaining no additional injury as a result of the fall. The following morning his arm was swollen and he sought medical attention with Dr. Michael McCoy, who eventually performed a fasciotomy after unsuccessful conservative treatment. Claimant initially claimed October 17, 1990 as the date of injury, later amending to claim a series of accidents from June 1, 1990 through April 30, 1991. Claimant alleged injuries to his right elbow, right arm, right shoulder and right wrist with the initial medical care provided in October 1990, to only the elbow and wrist.

Dr. McCoy diagnosed lateral epicondylitis of the right elbow which ultimately lead to the surgery in May 1991. Dr. McCoy opined that seventy-five to eighty percent (75-80%) of his patients having fasciotomies suffer no residual pain. However, claimant was not so fortunate. As a result of claimant's ongoing symptomatology Dr. McCoy rated claimant at ten percent (10%) permanent partial functional impairment to the right upper extremity. Dr. McCoy then released claimant to work without restrictions feeling that if claimant could work with the pain and soreness, claimant would suffer no additional damage.

Claimant continued in his employment with respondent until April 30, 1991. Claimant testified that after suffering a separate subsequent injury to his elbow involving a four hundred (400) pound roll of rubber roofing, he was unable to continue working for respondent.

In October 1992, claimant began complaining of shoulder pain in the right shoulder. Dr. McCoy was again the treating physician and diagnosed chronic rotator cuff tendinitis treating claimant conservatively without success. Elective surgery was proposed to claimant, which claimant declined. By February 1993, claimant was alleging involvement with both shoulders. Dr. McCoy ordered an arthrogram which proved negative for any damage to the rotator cuff and in May 1993 released claimant with the same diagnosis, advising he could provide no additional care to the claimant other than trying elective surgery.

Claimant was referred to Dr. Nathan Shechter at his attorney's request on October 8, 1991, approximately six (6) months after claimant terminated his employment with respondent. At that time, claimant had intermittent pain in his right elbow, mainly on the lateral aspect of the elbow. Claimant had no sensory disturbance in the upper extremity with no muscle atrophy. Claimant had no additional complaints to any other part of his body at the time of Dr. Shechter's examination. Dr. Shechter agreed with the diagnosis of Dr. McCoy finding claimant suffered from epicondylitis of the right elbow and rated claimant at twenty percent (20%) functional impairment to the upper extremity as a result of claimant's injury and resulting surgery. Dr. Shechter recommended claimant lift no more than twenty-five (25) pounds on a single lift and advised against any repetitive lifting.

Claimant was examined by Dr. Daniel Zimmerman at the request of claimant's attorney on August 23, 1993. Dr. Zimmerman diagnosed lateral epicondylitis to the right elbow with further diagnoses of rotator cuff tendinitis in claimant's shoulder. X-rays of claimant's shoulder also indicated early osteoarthritic changes with claimant suffering slight neurological deficit in the right hand. In combining both the shoulder and elbow injuries, Dr. Zimmerman opined claimant had suffered a seventeen percent (17%) permanent partial disability to the body as a whole and restricted claimant from lifting over twenty (20) pounds occasionally, ten (10) pounds frequently and advised claimant avoid work activities at shoulder height or above.

K.S.A. 44-501 makes it the claimant's burden to establish claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. This burden must be established by a preponderance of the credible evidence. See also K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in a case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. den. 249 Kan. 778 (1991).

In reviewing the evidence in the record, the Appeals Board concludes claimant has established by a preponderance of the credible evidence his entitlement to an award for an injury occurring to his right upper extremity. The medical evidence in the record contradicts claimant's allegations of shoulder problems as the records of both Dr. McCoy and Dr. Shechter show no symptomatology to claimant's shoulder before October 1992, approximately one and one-half (1 1/2) years after claimant's termination of employment with respondent. When claimant was examined by Dr. Shechter in October 1991, claimant's complaints were limited to the right elbow only. Medical evidence of this quality is hard to overcome when it is alleged by claimant that he suffered additional injuries at a time and date undesignated. The Appeals Board finds that there is insufficient evidence to show that claimant's right shoulder problems stem from his injuries to his right elbow. The Appeals Board finds claimant did suffer personal injury by accident on October 18, 1990 with the injury being limited to his right upper extremity, in particular, the right elbow.

K.S.A. 44-510d makes it clear that where claimant is entitled to only a permanent disability based upon a scheduled injury, there shall be no additional compensation paid.

The Appeals Board finds claimant is entitled to a functional impairment to the right upper extremity.

In reviewing the functional impairments to the right upper extremity by Dr. Shechter, Dr. Zimmerman and Dr. McCoy, the Appeals Board finds claimant has suffered a fifteen percent (15%) functional impairment to the right upper extremity as a result of injury occurring on October 18, 1990.

The Appeals Board further finds claimant has failed to prove by a preponderance of the credible evidence that he suffered accidental injury to any other part of his body on any date other than October 18, 1990. This finding renders moot the remaining issues in controversy.

The Appeals Board find the respondent failed to show knowledge of claimant's preexisting condition thus allowing that no liability be assessed against the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated March 15, 1995, shall be and is modified and claimant is granted an Award against the respondent, Stevenson Company, Inc., and Continental National American Group Insurance Company, for a 15% permanent partial functional impairment to the right upper extremity from his injury of October 18, 1990. Based upon an average weekly wage of \$682.40, claimant is entitled to 57.43 weeks temporary total disability compensation at the rate of \$278.00 per week in the sum of \$15,965.54, followed thereafter by 22.89 weeks permanent partial disability to the right upper extremity at the rate of \$278.00 per week totaling \$6,362.17 for a total award of \$22,327.71.

As of August 28, 1995, the entire sum shall be and is due and owing to claimant less any compensation previously paid.

Claimant is further awarded future medical upon proper application to and approval by the Director.

Unauthorized medical up to \$350.00 is ordered paid to on behalf of claimant upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

All compensation, medical expenses and costs are to be borne by the respondent and its insurance carrier with the Kansas Workers Compensation Fund having no liability in this matter. The Kansas Workers Compensation Fund shall be liable for its own attorney's fees.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Preliminary Hearing Transcript of Regular Hearing	Unknown \$339.45
Appino & Achten Reporting Service Deposition of Nathan Shechter, M.D. Deposition of Michael T. McCoy, M.D. Deposition of Lloyd Dean Langston Deposition of Monte R. Montgomery	\$ 99.70 \$203.60 \$241.60 \$ 70.60
Waters Court Reporting Service Deposition of Maria Montgomery	\$141.10
Gene Dolginoff Associates Deposition of Daniel D. Zimmerman, M.D.	\$360.65
Metropolitan Court Reporters Deposition of Gary Gammon	\$559.65

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
John D. Jurcyk, Lenexa, Kansas
Larry G. Karns, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director